No. 96-663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARVIN KLEHR and MARY KLEHR,

Petitioners,

—v.—

A.O. SMITH CORPORATION and
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Dated: March 20, 1997

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

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This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The National Hockey League ("NHL") has obtained and filed herewith the written consent of the petitioners and respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

The NHL and 22 of its member clubs are defendants in a civil RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021, pending in the United States District Court for the Eastern District of Pennsylvania. The named plaintiffs in that action, David S. Forbes, *et al.*, along with another group of RICO plaintiffs,[1] have submitted an *amicus curiae* brief in support of petitioners.[2]

The NHL joins in the arguments made by respondents and the other *amici* urging affirmance, and submits this brief chiefly to present the Court with a concrete example of the abuses inherent in any expansive RICO statute of limitations accrual rule, particularly the Third Circuit's "last predicate act" approach advocated by petitioners and their *amici*. What this aberrant rule has done is to allow a group of plaintiffs who -- for six, if not eleven, years prior to filing their RICO complaint -- knew all the material facts underlying their claim of injury, and all the material facts relating to their allegations of a pattern of racketeering activity, to survive a motion to dismiss on statute of limitations grounds.

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1 Plaintiffs' Executive Committee in *In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, MDL No. 1069 (D. Md.).

2 A motion to allow that *amicus* brief to be filed late was submitted to this Court on March 5, 1997.

ARGUMENT

Introduction

While it has been conclusively established by this Court that the statute of limitations for civil RICO claims is four years, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), the Circuits have divided as to when a civil RICO claim accrues and the statute begins to run. The Third Circuit, one of the first to address the accrual issue in the wake of *Agency Holding*, determined that a civil RICO claim accrues on:

> the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988).

None of the other Circuits have followed the *Keystone* accrual rule. The Third Circuit stands alone (*see* 2a) in allowing the statute of limitations to be extended simply because of the alleged commission of further predicate acts in the same pattern, even if those predicate

acts have not caused any injury whatsoever to the plaintiff.

Rejection of the "Last Predicate Act" Rule

The First, Second, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits have embraced what has become known as the "injury discovery" rule, under which a civil RICO claim accrues when the plaintiff discovered or should have discovered the injury; any subsequent injury gives rise to a *new* claim, but does not extend the limitations period for the earlier injury. *See Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990) (Breyer, C.J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-66 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. dismissed*, 117 S. Ct. 759 (1997); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); *see also Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (same, but without separate accrual rule for each injury).

The Eighth Circuit in the decision below, together with the Sixth, Tenth and Eleventh Circuits, have adopted an alternative accrual rule, known as the "injury and pattern discovery" rule, pursuant to which a civil RICO claim accrues when the plaintiff discovers, or reasonably should have discovered, the existence and source of the injury and that the injury is part of a pattern. *See Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233 (6th Cir. 1992); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 725 (1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153-54 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *overruled in part on other grounds sub nom. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla. Inc.*, 906 F.2d 1546, 1550-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

Judicial Criticism of Keystone

The Third Circuit's unique rule has been expressly criticized by a number of circuits. In the First Circuit's decision in *Rodriguez v. Banco Central*, 917 F.2d at 667, then-Chief Judge Breyer rejected the *Keystone* approach because of the extended period of time that it provides for plaintiffs to file suit:

> [i]f the "pattern" took the form of one related act, say, every two years (so that each act "occurred within ten years . . . after a prior act"), say for thirty or forty years, the Third Circuit's test, literally interpreted, would permit the plaintiff (injured in 1980) to bring suit thirty-four or forty-four years later.

Likewise, the Seventh Circuit has criticized the *Keystone* rule's potential effect of permitting a further act to sweep otherwise time-barred prior acts into the limitations period even when the further act did not injure the plaintiffs:

> while more recent acts in a normal continuing violation will involve harm to the plaintiff, *a RICO plaintiff [under the Keystone rule]*

> *could bring suit based on recent predicate acts that harmed others, or no one.*

McCool v. Strata Oil Co., 972 F.2d at 1466 (emphasis supplied).

The pernicious effects of the *Keystone* rule, and then-Chief Judge Breyer's prediction in *Rodriguez* that *Keystone* "would permit the plaintiff . . . to bring suit thirty-four . . . years later," can perhaps best be illustrated by an all-too-real example: how one set of plaintiffs were able to sit on their rights for several years – with full knowledge of all the facts underlying their RICO claims – and survive a motion to dismiss on statute of limitations grounds solely because they chose to bring suit in the Third Circuit.

Forbes v. Eagleson

For many years, professional hockey players, their agents and members of the news media charged that R. Alan Eagleson abused his position as Executive Director of the National Hockey League Players' Association (the "NHLPA"). These detractors complained that Mr. Eagleson was excessively friendly with management, had numerous conflicts of interest and seemed to be far more interested in various schemes to enrich himself personally than he was in representing his constituency.

As early as July 2, 1984, a *Sports Illustrated* article entitled "The Man Who Rules Hockey" described in great detail Mr. Eagleson's asserted "conflicting roles" and the benefits he purportedly obtained for himself as a "friend of management." The article accused Mr. Eagleson of diverting funds from international hockey tournaments and improperly profiting from his control over the

placement of player disability insurance coverage. It listed the various individuals and companies through whom Mr. Eagleson allegedly channeled his international hockey ventures (including many of the defendants named in the *Forbes* complaint), and repeatedly suggested that Mr. Eagleson was profiting from each of these various enterprises.

The widespread belief among NHL players that Mr. Eagleson had for many years engaged in extensive misconduct to the detriment of the union caused the players to commission attorney Edward Garvey to conduct a thorough evaluation of Mr. Eagleson's activities. In the summer of 1989, more than 6-1/2 years prior to the initiation of the *Forbes* action, Mr. Garvey issued a lengthy and detailed report that echoed and expanded upon the allegations of the *Sports Illustrated* article and set forth at length and with considerable specificity *all* the essential elements of the *Forbes* complaint.

The essence of the Garvey Report was that Mr. Eagleson was controlled by the NHL, which in turn obtained everything it wanted in its labor negotiations with the union. Mr. Garvey advised the players that Mr. Eagleson's loyalty had in effect been purchased by the NHL in exchange for the revenues from international hockey tournaments that Mr. Eagleson managed. The Garvey Report revisited each major event in the union's history, alleging at every step along the way that the NHL, with Mr. Eagleson's connivance, had artificially depressed player compensation and benefits. Mr. Garvey concluded that the NHL "won" every negotiation with the union because of its alleged "deal" with Mr. Eagleson.

Over six years later, a group of lawyers – including Mr. Garvey – recast these criticisms of Mr. Eagleson

into a RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021 (E.D. Pa.). The *Forbes* plaintiffs boasted that they chose to bring their case in Pennsylvania, a forum that bears virtually no relationship to the facts of the dispute, to take advantage of the *Keystone* rule and withstand a statute of limitations defense.

Echoing the statements in the *Sports Illustrated* article and the Garvey Report, the *Forbes* plaintiffs contend that, with respect to the four collective bargaining agreements negotiated between 1972 and 1991, when Mr. Eagleson's contract as Executive Director expired, a different and more beneficial agreement would have been reached had Mr. Eagleson not been given control of international hockey tournaments and disability insurance. According to the *Forbes* complaint, had Mr. Eagleson been a more vigorous bargainer, hockey players would have secured higher salaries and other benefits from their respective employer clubs.

Citing *Keystone* and noting that it was "bound by this Circuit's *unique* accrual rule" (2a[3]; emphasis supplied), the district court denied the NHL's motion to dismiss the complaint. Although the allegations of the Garvey Report reverberate in the *Forbes* complaint, and the *Forbes* plaintiffs knew of their injury more than six years before the complaint was filed, the complaint was sustained under the "last predicate act" rule, with the predicate acts in question having nothing whatsoever to do with any of plaintiffs' purported injuries.

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[3] For the Court's convenience, the district court's opinion in *Forbes v. Eagleson* is reproduced in full as an appendix to this brief.

Forbes also illustrates the dangers of allowing the "last predicate" act to determine the point at which a civil RICO claim accrues; application of the *Keystone* principle demonstrates that in certain circumstances, the statute of limitations may not begin to run for years after the core racketeering activity has ceased and the enterprise has disbanded.

The *Forbes* plaintiffs attempted to enliven their claim by alleging that predicate acts occurred within four years of the filing of their complaint. Even though the alleged giving of "control" to Mr. Eagleson over international hockey was alleged to have occurred years earlier, the *Forbes* plaintiffs contended that whenever Mr. Eagleson received proceeds from the international tournaments the NHL committed a new and distinct predicate act.[4] The district court accepted this proposition, on constraint of *Keystone*, concluding "that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts" extending the statute of limitations. (5a)[5]

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[4] Indeed, in their *amicus curiae* brief in this case (at 3), the *Forbes* plaintiffs suggest that the alleged wrongful conduct on the part of the NHL continues "to the present," presumably, in their view, postponing the accrual of their RICO claim indefinitely.

[5] In so doing, the district court declined to follow a line of cases holding that mere use of a previously conferred benefit (or, alternatively, the continued profiting from a wrongful act) is insufficient to create a string of new, separate predicate acts. *See Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 50 (7th Cir. 1989); *R.E. Davis*

On any level, allowing plaintiffs to bring suit many years after they became aware of all of the facts underlying their claims is antithetical to the concept and purpose of statute of limitations. As this Court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted), "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" The "last predicate act" rule, which only the Third Circuit endorses, allows stale claims to moulder and still fall within the statute of limitations.

We respectfully submit that public policy favors a rule that provides a measure of certainty to those who would sue or be sued in a civil RICO action, not one that allows claims to linger in perpetuity for so long as the effects of an abandoned racketeering enterprise continue to be felt.

Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. 1499, 1520 (N.D. Ill. 1990); *see also Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 708 (N.D. Ill. 1991).

CONCLUSION

For the foregoing reasons, *amicus curiae* National Hockey League respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: March 20, 1997

APPENDIX

APPENDIX

DAVID S. FORBES ET AL.
V.
R. ALAN EAGLESON ET AL.
CIVIL ACTION NO. 95-7021.
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA.
JULY 22, 1996,
AMENDED JULY 23, 1996.
MEMORANDUM AND ORDER

O'NEILL, J.

Defendants have moved to dismiss the Complaint or to transfer or stay the action. I will decide these motions on the pleadings[1] and thus must accept the well-pleaded factual allegations as true, construe them favorably to plaintiffs, and determine whether "under any reasonable reading of the pleadings, the plaintiff[s] may be entitled to relief." *Colburn v. Upper Darby Township*, 838 F.2d 663, 664-65 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). Dismissal is proper at this stage only if no relief could be granted under any set of facts that could be proven. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

I. Statute of Limitations

Defendants assert that the Complaint, which was filed November 7, 1995, is time-barred under the

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[1] Because materials submitted outside the pleadings raise disputed issues of fact and admissibility I confine my inquiry to the pleadings and reserve consideration of the additional matter until further factual development.

four-year limitations period that governs civil RICO actions. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). A claim accrues when:

> plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same racketeering activity.

Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988) (emphasis added); *accord Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174 (3d Cir. 1993).[2]

Plaintiffs allege an ongoing scheme between their former labor representative Alan Eagleson and the National Hockey League[3] whereby Eagleson, as director of the NHL Players' Association, "cooperated with the NHL ... to maintain a company dominated union to the detriment of the players and to the benefit of the NHL." Complaint at ¶ 58(l).

The NHL allegedly induced Eagleson's cooperation by: (1) entering international hockey tournament joint ventures with Eagleson and the NHLPA; (2) assuring the

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[2] I am bound by this Circuit's unique accrual rule.

[3] References to the NHL include all NHL-affiliated defendants.

tournaments' profitability by allowing players otherwise forbidden to compete outside the NHL to participate; and (3) affording Eagleson "substantial personal profit" by giving him "unsupervised control" of the tournaments and "deliberately and repeatedly fail[ing] to hold him accountable for [tournament] proceeds" belonging to the NHL and NHLPA. ¶¶ 2-3, 36-38. In return for diverting its share of tournament profits to Eagleson the NHL obtained "control and influence" over him which allowed it to elicit concessions in collective bargaining, player salaries and other players' rights, generating "substantial ... additional profits" for the NHL due to the "players' artificially low earnings." ¶¶ 3-4, 57.

Plaintiffs allege that this scheme of knowing or deliberate failures to hold Eagleson accountable for tournament revenues continued until Eagleson relinquished his role as NHLPA Executive Director on December 31, 1991 because Eagleson continued to receive and appropriate NHL and NHLPA tournament profits throughout that time. ¶¶ 3, 41, 43-46, 56. I must decide whether these wrongful receipts of NHL and NHLPA funds in late 1991 can constitute predicate acts within the alleged pattern of racketeering activity.

A. Predicate Acts

The Labor Management Relations Act forbids employers to deliver "any money or other thing of value" to labor representatives and forbids labor representatives to receive the same. 29 U.S.C. § 186(a)-(b). Violations of § 186 constitute predicate acts of racketeering under RICO. 18 U.S.C. § 1961(1)(C). Plaintiffs assert that: (1) "[e]ach receipt of [tournament] funds by Eagleson was a separate bribe under Section 186, and a separate predicate act;" and (2) these transfers of NHL funds to Eagleson

through international hockey ventures continued throughout 1991. Mem. at 16; Complaint at ¶¶ 41, 44-46, 56, 81.

It is well established that each delivery or receipt of a "thing of value" can constitute a separate § 186 violation and a separate RICO predicate act, even when the payment is part of one continuous, previously devised bribery scheme. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995); *United States v. Boffa*, 688 F.2d 919, 934 (3d Cir. 1982).

Defendants, however, characterize Eagleson's ongoing receipt of tournament profits throughout 1991 as "mere use of a previously conferred benefit" or "continued profiting from a wrongful act," Reply Mem. at 7. Such further use of or profit from a previously obtained item would not constitute a further predicate act. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (later sale of misappropriated software); *Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 709 n.3 (N.D. Ill. 1991) (later use of wrongfully obtained customer list); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1520 (N.D. Ill. 1990) (later use of wrongfully obtained chemical formula).

The instant Complaint does not, however, allege that Eagleson received one thing of value--control over international hockey--and then merely used it in otherwise lawful ways. The predicate acts it alleges are thus not analogous to lawful transactions like the sale of software in Management Computer that are tainted only by the use therein of previously misappropriated items. Rather, the further transfers of value alleged in this case,

which themselves violate § 186, are more closely analogous to the later use of misappropriated software to make further unlawful acquisitions. Where, as here, the later acquisitions in themselves violate the law regardless of the assets used to facilitate them, Management Computer is distinguishable. I thus find Management Computer and its progeny inapposite and conclude that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts and not mere continuing uses of or profits from a prior wrong. Defendants further argue that in contrast to Cox and Boffa, which involved "affirmative acts by an employer," the continuing transfers of value alieged in this case constitute a mere "failure to ... prevent ... payment by a third party." Reply Mem. at 7. I am unpersuaded by their argument that a transfer of value violates § 186 only if the employer affirmatively and directly delivers the item of value to the labor representative.[4]

Section 186 forbids "all forms of bribery between management and labor officials" including indirect as well as direct means. *United States v. Lanni*, 466 F.2d 1102 (3d Cir. 1972). It does not permit such bribery as long as the schemes are structured so as to eliminate the need for management to affirmatively facilitate each transfer. Under such an interpretation employers could devise indirect or passive bribery schemes by simply affording labor representatives access to accounts and ignoring

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[4] Nor can I read the Complaint to suggest that a "third party" delivered the bribes when it alleges that: (1) Eagleson alone controlled tournament profits; and (2) tournament profits belonging to the NHL were transferred to Eagleson with the NHL's knowledge or deliberate ignorance. ¶¶ 2-3.

their periodic withdrawals therefrom. I do not read § 186 so narrowly.

I thus conclude that the Complaint, which asserts that the NHL transferred funds to Eagleson through December 31, 1991 by knowingly or deliberately allowing him to appropriate a share of their joint venture profits, adequately alleges predicate acts occurring after November 7, 1991.

B. Pattern

A further predicate act does not postpone accrual of a RICO claim unless it is within the same pattern of racketeering activity. *Keystone*, 863 F.2d at 1126. A pattern arises from common purposes, results, participants, methods, and other traits. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

Plaintiffs allege that "through at least the end of 1991" the "object and purpose" of the racketeering scheme was to:

> cause Eagleson ... to come under the influence and control of the NHL ... and to fail to aggressively represent the interests of the NHLPA players by granting unreasonable concessions to and failing to seek benefits from the NHL ... [and] to enable the Member Clubs to pay far less in compensation to the NHLPA players than they would otherwise have paid.

¶ 71. They thus allege common purposes underlying the scheme through the end of 1991.

Defendants argue that bribes to Eagleson in 1991 could not have shared these asserted purposes because Eagleson had not negotiated a collective bargaining agreement since 1988; thus any later bribes must have been "for some purpose other than to extract concessions ... in labor negotiations." Reply Mem. at 10.

I am not persuaded. First, payments may share a common purpose of management-labor bribery even if not intended to elicit future concessions; payments for past concessions can also form part of the same pattern. *Cox*, 17 F.3d at 1386. Second, the alleged object and purpose speaks not just in terms of bargaining concessions but also in terms of a more general failure to "aggressively represent" or "seek benefits for" the players. Reading these allegations favorably to plaintiffs, as I must when evaluating the sufficiency of the pleadings, I find that the alleged purpose extends beyond contract negotiations to all Eagleson's functions as a labor representative. His duty and opportunity to advance the players' interests, see ¶ 32, and thus the NHL's incentive to influence him, continued until he resigned as NHLPA Executive Director on December 31, 1991, regardless of when the last contract was entered or when it expired.[5] Because plaintiffs could prove facts consistent with their allegation that these payments shared a common purpose with the other alleged racketeering acts and formed part of the

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[5] Indeed the incentive to influence a labor representative may be strongest when a collective bargaining agreement is up for renegotiation as may have been the case in late 1991.

same pattern, dismissal on the pleadings would be inappropriate. *See Hishon*, 467 U.S. at 73.[6]

Finding that plaintiffs have adequately alleged predicate acts that: (1) constitute part of the same pattern of racketeering activity; and (2) fall within the limitations period which extends back to November 7, 1991, I will deny defendants' motion to dismiss the Complaint as time-barred.[7]

II. Standing and Proximate Causation

To establish standing to bring RICO a claim under 18 U.S.C. § 1964(c) plaintiffs must allege that defendants' violations proximately caused plaintiffs' injury. *Holmes v.*

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[6] The complaint sufficiently alleges predicate acts of violating 29 U.S.C. § 501 occurring after November 7, 1991 and constituting part of the same pattern of embezzlement and conversion to bring Count II within the limitations period. *See, e.g.*, ¶¶ 44-46, 81, 88, 96.

[7] Because *Keystone* delays accrual until notice of the last predicate act within the racketeering pattern and because I have found that the Complaint alleges such acts within the limitations period, I need not decide the date of other events that could trigger accrual. *See* 863 F.2d at 1126. I note, however, that because plaintiffs allege that both corruption of their labor representative and consequent losses of economic benefits occurred throughout 1991, see ¶¶ 4, 59, it would be difficult to conclude as defendants urge that any economic injuries suffered in 1991 were mere continuing effects of the 1988 collective bargaining agreement and could not under any set of facts constitute "new and distinct" injuries sufficient to delay accrual. *See Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991).

Securities Investor Protection Corp., 503 U.S. 258, 268-69 (1992) (requiring "some direct relation" between violations and injuries).

I am unpersuaded by defendants' argument that plaintiffs' alleged injuries are derivative of the NHLPA's and thus could not have been proximately caused by the alleged violations. Count I alleges that, because of payments made in violation of § 186, Eagleson harmed the players' interests by making concessions and failing to seek benefits, causing "substantial suppression" in the players' earnings. *See* ¶¶ 1, 4, 57-59. Because the NHLPA had no rights to player salaries or benefits I conclude that the injuries alleged under Count I are not derivative of any harm inflicted on the NHLPA but rather were a consequence of the alleged racketeering scheme.

Count II alleges that Eagleson and others misappropriated NHLPA funds. Though this conduct clearly caused economic harm to the NHLPA, the NHLPA has assigned its claims to plaintiffs. This assignment eliminates any risk of double liability and permits plaintiffs to bring this claim. *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977) (noting double liability concern but declining to address standing issue).

Defendants, citing *United States for Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989), argue that the assignment cannot relate back to revive a claim filed by a party other than the real party in interest. However, Fed. R. Civ. P. 17(a) provides that:

> No action shall be dismissed on the ground that it is not prosecuted by the real party in interest until a reasonable time has been allowed ... for ratification of commencement

> of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Rule is intended "to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made." *Wulff*, 890 F.2d at 1074 (citing Fed. R. Civ. P. 17 advisory committee note; 6 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1555). In this case the players' and the union's interests are closely intertwined. The Count II allegations, which affect not just general union funds but also items like the players' pension fund and disability insurance, blur distinctions between the union's and the players' interests. In light of this difficulty in discerning the identity of the real party in interest, a difficulty which distinguishes this case from Wulff, I conclude that the purposes underlying Fed. R. Civ. P. 17 would be served by recognizing the assignment.[8] I thus

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[8] Though I need not reach the issue I note that plaintiffs might have had standing even without the assignment. In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988), the court denied union members standing to assert a RICO claim since the alleged injuries affected the union rather than its individual members. *Bass* is distinguishable, however, because in *Bass* more than half the union members opposed the suit, demonstrating a divergence between the interests of the union as a whole and those of the plaintiffs. Indeed, the *Bass* court noted that had the plaintiffs demonstrated a consensus within the union by obtaining class certification the action might have survived the motion to dismiss "because it would have then alleged an injury common to the class of local members." *Id.* While I reserve judgment on plaintiffs' motion for class certification I note that no such divergence of interests between the union and its constituent members appears at this point. Likewise, in *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989), which denied stockholders standing to assert a RICO claim for violations that diminished the corporation's value, the court noted that it could not find, as the plaintiffs urged, that the "distinction between a direct and a derivative injury is blurred in this case" since "various stockholders have opposed" plaintiffs' claims. By contrast, the distinction between direct and derivative harm fades in this case. The commonality of the harm to the union members blurs the distinction between harm to the NHLPA membership and harm to the NHLPA itself, undermining defendants' argument that under no set of facts could plaintiffs' injuries prove sufficiently direct to confer standing.

find that plaintiffs have demonstrated the requisite standing to assert Counts I and II of the Complaint.

III. Personal Jurisdiction

A court cannot exercise personal jurisdiction over a defendant without a proper basis for serving the defendant with process. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Plaintiffs seek to establish jurisdiction over Canadian defendants served in Canada under RICO's nationwide service provision, 18 U.S.C. § 1965, which allows service of process in "any judicial district of the United States."

Though § 1965 authorizes national service of process, it does not authorize international service. *Stauffacher v. Bennett*, 969 F.2d 455, 460-61 (7th Cir.), *cert.*

denied, 506 U.S. 1034 (1992); *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453, 1460 (E.D.N.Y. 1984).[9] Section 1965 thus does not authorize service of the Canadian defendants in Canada.

Plaintiffs must therefore serve process and attempt to establish personal jurisdiction under state law. *See* Fed. R. Civ. P. 4; *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1522-23 (11th Cir. 1990). State law requires certain minimum contacts with Pennsylvania. *See* 42 Pa.C.S. § 5322(a).[10]

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[9] *In re All Terrain Vehicles Litigation*, 1989 WL 32754 (E.D. Pa. 1989), did not permit service abroad under § 1965 but rather held only that § 1965's limitation to judicial districts of the United States did not invalidate service outside the United States that was properly effected under a state longarm statute.

[10] Though aggregate contacts with the United States may suffice under the Due Process Clause to confer jurisdiction over an alien properly served under a nationwide service of process provision, *see Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 291, 294 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985), when the nationwide service provision does not govern because it is limited to judicial districts of the United States and process was served abroad, aggregate national contacts cannot provide the basis for serving process. Plaintiffs must thus resort to state service of process provisions. Pennsylvania law permits service only when defendants have certain "minimum contact with this Commonwealth." *See* 42 Pa.C.S. § 5322(a), (b), (d). Absent this statutorily required forum-specific contact, service is not authorized, see § 5322(d), (b), and personal jurisdiction is lacking. *See Omni Capital*, 484 U.S. at 104.

Plaintiffs request and are entitled to discovery relevant to determining jurisdictional facts. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670 (D.C. Cir. 1996). They shall be permitted to take discovery regarding the Canadian defendants' contacts with Pennsylvania and disputed communications involving consent to service of process.

IV. Forum Non Conveniens

The doctrine of forum non conveniens permits a court, in its discretion, to decline to exercise jurisdiction it possesses. Thus the doctrine "can never apply if there is absence of jurisdiction." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). I cannot yet determine whether I may exercise personal jurisdiction over many of the defendants. I will thus reserve judgment on the forum non conveniens issue. Only after determining whether the Canadian defendants will remain in the case can I accurately assess whether a Canadian forum is more appropriate.[11]

V. Particularity

Because I am not yet assured of my personal jurisdiction over the Canadian defendants I reserve judgment as to the sufficiency of the pleadings against them.

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[11] A party seeking transfer on forum non conveniens grounds must demonstrate both that there is an adequate alternate forum and that public and private interests weigh in favor of transfer. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225-26 (3d Cir. 1995); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988). I do not reach either question at this time.

VI. Transfer

Defendants urge the Court to transfer the action to the District of Massachusetts, where a grand jury has indicted Eagleson on criminal charges, in the interests of justice and convenience pursuant to 28 U.S.C. § 1404(a). They bear the burden of justifying the transfer. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 (3d Cir. 1973); *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991).

Defendants argue that the Massachusetts court's "familiarity" with the case will expedite resolution and minimize conflicts between the civil and criminal cases. They have not shown any advantages concerning access to evidence, availability of compulsory process, convenience of witnesses[12] or other factors making trial more expeditious in Massachusetts than in Pennsylvania. *See O'Brien*, 761 F. Supp. at 1229.

Though ordinarily the pendency of a criminal case in another forum would weigh in favor of transfer, in this case Eagleson has not submitted to the Massachusetts court's jurisdiction. Consequently the criminal action has not progressed since the indictment was handed down two years ago. Discovery has not been taken and the Massachusetts judge has had no apparent opportunity or reason to become familiar with the case.[13] Moreover,

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[12] Absent any argument that their testimony is material I find the Massachusetts residence of two of the plaintiffs unpersuasive. *See Plum Tree*, 488 F.2d at 756 n. 2, *O'Brien*, 761 F. Supp. at 1230.

[13] Indeed there is no assurance that the civil action if transferred would be assigned to the same Judge.

this action involves numerous defendants not under indictment in Massachusetts. I therefore find that defendants have not satisfied their burden of demonstrating that transfer to the District of Massachusetts will serve the interests of justice or convenience.

VII. Stay

Defendants seek to stay civil proceedings pending resolution of the criminal action against Eagleson. Weighing the competing interests of plaintiffs, defendants, the courts, non-parties and the public, *see In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749, 756 (E.D. Pa. 1995); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980), I find that a stay is appropriate as to all aspects of this case except the outstanding jurisdictional issues.

Though many of the civil defendants are not under criminal indictment, Eagleson is the central figure in each case and the substantive allegations overlap considerably. Were the civil action to proceed, Eagleson would face a choice between defending himself in the civil action at the risk of incriminating himself in the criminal case, or asserting his Fifth Amendment privilege at the risk impeding his defense or raising an adverse inference. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Plaintiffs have a general interest in proceeding expeditiously with their case. The instant case does not, however, present any particular risk of further violations, destruction of evidence, or other forms of prejudice due to delay. Plaintiffs' interests are therefore outweighed by the constitutional implications of Eagleson's interest. *See*

Volmar Distrib., Inc. v. New York Post Co., 152 F.R.D. 36, 40 (S.D.N.Y. 1993).[14]

Because the other defendants are not under criminal indictment and would not face the same burdens as Eagleson in defending the civil case, I have considered staying the case only as to Eagleson. I have concluded, however, that a partial stay would not serve the Court's, the parties' or the witnesses' interests. Eagleson is a central figure in all the allegations and his testimony is critically important. Discovery taken without the benefit of his testimony would be incomplete and could require plaintiffs to repeat depositions in light of information later obtained from Eagleson. *See Volmar*, 152 F.R.D. at 41.[15] Thus I find that the benefits, if any, of allowing the rest of the case to proceed while staying the case only as to Eagleson would not outweigh the inefficiency and expense of the duplicative discovery likely to be necessitated thereby.

While the foregoing analysis applies to the substantive issues in the case it does not apply to defendants' jurisdictional challenge. Eagleson's contacts with Pennsylvania are not at issue in the criminal case. Therefore,

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[14] The fact that the criminal indictment primarily involves the Count II allegations does not obviate the need for a stay as to Count I as well. Because both Counts involve Eagleson's alleged appropriation of tournament profits they are too factually intertwined for me to find that Fifth Amendment concerns are confined to Count II.

[15] Moreover, the availability of transcripts and other evidence from the criminal trial could streamline discovery, and the outcome of the criminal case could encourage settlement. *See Volmar*, 152 F.R.D. at 41-42.

as to these jurisdictional issues I do not find that Eagleson's risk of self-incrimination outweighs plaintiffs' interest in proceeding with their civil case. I will therefore permit discovery to proceed as to Eagleson and the other Canadian defendants regarding their contacts with Pennsylvania and will otherwise stay the case.

I would, however, be abusing my discretion to stay the case indefinitely. *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). I am cognizant that Eagleson himself is a primary cause of the delay in the criminal case and that staying the civil action until resolution of the criminal case can only increase his incentive to prolong that delay. I will therefore enter the stay without prejudice to plaintiffs' right to petition the Court to have it lifted if the delay in the criminal case persists for an undue time after the jurisdictional issues in this case are resolved or if other circumstances so warrant.

AND NOW this day of July 22, 1996 upon consideration of defendants' motions to dismiss the Complaint or to transfer or stay the action, the parties' filings related thereto and the parties' oral arguments before the Court it is hereby ORDERED as follows:

(1) Defendants' motion to dismiss the Complaint as time-barred is DENIED.

(2) Defendants' motion to dismiss the Complaint for lack of standing is DENIED.

(3) The Canadian Defendants' motion to dismiss for lack of personal jurisdiction is hereby DENIED without prejudice to renewal following the close of discovery. Plaintiffs may take discovery regarding jurisdictional facts including the Canadian Defendants'

contacts with Pennsylvania and communications alleged to indicate consent to jurisdiction. Such discovery shall be completed within ninety (90) days from the date of this Order. The parties will submit briefs on the outstanding jurisdictional issues within thirty (30) days from the date of the close of discovery.

(4) Defendants' motion to transfer the case on *forum non conveniens* grounds is DENIED without prejudice to renewal by letter application following the Court's resolution of the outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(5) The Canadian Defendants' motion to dismiss the Complaint for lack of particularity is hereby DENIED without prejudice to renewal by letter application following the Court's resolution of outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(6) Defendants' motion to transfer the case to the District of Massachusetts is DENIED.

(7) Defendants' motion to stay this action is GRANTED and this action is hereby STAYED pending disposition of the criminal indictment except as to resolution of the outstanding jurisdictional issues as specified in paragraph (3) of this Order. This stay is entered without prejudice to plaintiffs' right to petition the Court to have it lifted on grounds identified in the accompanying Memorandum.